

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 27 OF 2008

FREDRICK KUSIMBA.....APPELLANT

V E R S U S

NUSRA AUTOPARTS LTD.....RESPONDENT

J U D G M E N T

The respondent filed a suit against the appellant and another seeking KShs.10,200/= being the balance of two (2) tyres. The trial court held that the appellant was to pay the balance of the cost of the good. Being dissatisfied by that decision the appellant preferred this appeal.

In his memorandum of appeal the appellant listed eight grounds of appeal. All the grounds were argued together. The main issues raised in the memorandum of appeal and the written submissions is that the plaintiff was the only witness and his evidence was not credible, the alleged transaction did not exist, a receipt produced as PEX 2 was allegedly issued to the appellant yet it was still in possession of the respondent, the appellant was not the proper defendant, the appellant's defence was not considered and that since the plaintiff's case was based on contract, the requirements of Section 3(1) of the Law of Contract Act were not fulfilled as there was no written agreement. The appellant further contends that there was no evidence that he was the agent of the 2nd defendant.

On his part the respondent states that his evidence was not discredited and that it was the appellant who collected the two tyres. The trial court had the advantage of observing the demeanor of the parties and that the appellant's phone number was on the receipt produced as exhibit 2.

The trial court record shows that only the plaintiff testified on the part of the plaintiff and the appellant testified for the defence. No other witness testified. There was a second defendant but he did not testify. The plaintiff/defendant's evidence was that he is a businessman who deals in motor vehicle parts and accessories. The defendants were his customers and on 12th October 2005, the appellant went to his shop and requisited to purchase two (2) tyres costing KShs.20,500/=. He paid KShs.10,300/= leaving a balance of KShs.10,200/=. The plaintiff knew that the tyres were meant for the 2nd defendant who had a motor vehicle. The respondent prepared a receipt and the appellant signed on the receipt. The appellant took the goods and the balance of the purchase price was not paid.

On his part, the appellant's testimony was that he does not own a vehicle and that he has never taken tyres on credit from the plaintiff. Indeed he did not know the plaintiff and was not given the receipt that was produced as PEX.2. The appellant categorically denied ever having done any transaction with the plaintiff. The appellant is a teacher by profession and knew Coronel Anguche who is also a fellow teacher and farmer. Anguche was presumably the 2nd defendant who according to the appellant owns several vehicles but has never sent the appellant to pick spare parts on his behalf.

The trial magistrate in the judgment held in favour of the plaintiff against the 1st defendant alone on the ground that it was the appellant who took the tyres from the respondent's shop.

The proceedings in short were the respondent's word against that of the appellant. The respondent produced a certificate of incorporation for his business and established that he was carrying on a valid

business. He also produced a receipt which coincidentally had the appellant's mobile phone number 0733954470 written on it. The receipt also has a signature but the appellant denied that that was his signature. The defence tendered by the appellant was a strong denial on all aspects of business transactions. The appellant confirmed that he knew one Anguche who I do hold was the 2nd defendant, who happens to own motor vehicles.

From the proceedings herein I am satisfied that the trial court reached at the right verdict. There was ample evidence to hold in favour of the plaintiff. The plaintiff maintained that he knew the appellant. It was therefore not a case of mistaken identity. The plaint gave the appellant's name as Fredrick Okusimba. The appellant, when testifying gave his name as FREDRICK NUMUNYU KUSIMBA. I do find that the two names Fredrick Okusimba and Fredrick Numunyu Kusimba meant the appellant herein. In normal business transaction, customers in a shop are not asked to produce their identity cards. In any case, the respondent testified that he knew the appellant and it was the appellant who appeared in court.

On the issue of Section 3(1) of the Law of Contract, it is clear from the provisions of the section that in each transaction there must be a written agreement. The section state in part – **“unless the agreement upon which such suit is brought, or some memorandum or notes thereof, is in writing and signed by the party to be charged therewith”**. I do find that the receipt produced by the respondent was sufficient to fulfill the requirement of Section 3(1) of the Law of Contract Act. The receipt bares the goods sold, the amount paid, the balance due, the appellant's phone number and a signature. There was no need for a document examiner to analyze the receipt as contended by the appellant. The appellant denied that the signature on the receipt was not his but the telephone number was his. The case having been civil in nature did not require to be proved beyond reasonable doubt. The trial court saw the demeanor of the parties. The appellant's defence was based on denying everything. He denied that he was the 1st defendant, that he knew the plaintiff, that he had ever transacted with the plaintiff, that he signed the receipt and that he has ever paid the plaintiff any money. I do find that it was not mere coincidence that the appellant's phone number was written on the receipt and that the transaction involved tyres with the appellant confirming that the 2nd defendant owned vehicles. It was the plaintiff's evidence that the tyres were meant for the 2nd defendant's vehicle.

In the end, I do find that the appeal lacks merit and the same is dismissed with costs to the respondent.

Delivered and dated at Kakamega this 27th day of March 2012

SAID J. CHITEMBWE
J U D G E